SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-414

VULCAN MATERIALS COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF THE ORDER DENYING THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Now comes Vulcan Materials Company, petitioner in the above styled proceeding, and petitions for a rehearing of the order denying the petition for a writ of certiorari entered on November 9, 1971, and in support thereof, respectfully shows the following unto the Court:

1. Because of the promulgation of Technical Information Release 773 by the Commissioner of Internal Revenue on, to-wit, October 13, 1965, it is improbable that there will here-

after be a conflict in decision on the denial of the net operating loss carryover based on the provisions of Section 269 of the 1954 Code, although the decision of the Court of Appeals is urged to be incorrect and relates to an important question of federal law which has not been, but should be, settled by this Court.

The petition did not present the foregoing as a ground for granting the writ because of the contention therein that the decision of the Court of Appeals below was in conflict with the decision in *Maxwell Hardware Co.* v. *Commissioner,* 343 F.2d 713 (9 Cir., 1964). In its brief in opposition, the United States has asserted that there was no conflict, on predicates we deem to be erroneous. However, if we are mistaken in this contention, then it is improbable that any other decision will be hereafter rendered which is in conflict with the decision below.

This results from a declaration of policy by the Commissioner of Internal Revenue made in a Technical Information Release on October 13, 1965 and unofficially reported in ¶ 6751 of the Commerce Clearing House income tax service for that year. The release is copied in the appendix to the petition, pages 37a-39a. The part of that release which is relevant to the petition reads:

> "The Service will not rely on *Libson Shops* under the 1954 Code in any loss carryover case where there has been less than a 50 percent change in the beneficial ownership of the loss or where there has been no change in business as defined in section 382(a) and the regulations thereunder. However, the Service will continue to rely on sections 269 and 482, where appropriate, in dealing with the carryover of losses. Revenue Ruling 63-40, C.B. 1963-1, 46 will be modified to the extent inconsistent herewith."

This extract from TIR 773 is copied in the opinion of the Court of Appeals (p. 15a), and that Court expresses disagreement therewith. However, consideration of the extract, in the context of the entire release, effectively demonstrates that it is improbable that the Commissioner will deny a net operating loss carryover in any case in which there is a change of less than 50% in the beneficial ownership of the loss.

In the case at bar, the Court of Appeals undertook to distinguish its own decision in *U. S.* v. *Jackson Oldsmobile, Inc.,* 371 F.2d 808 (5 Cir., 1967) on the theory that there had not been any change in business (p. 14a). However, that was not the ground on which the affirmance was placed by the Court of Appeals, and the concurring opinion therein contained a basic reference to TIR 773 as follows:

> "The Trial Judge was therefore correct in concluding that GM, as owner of 60% of the stock, received the majority benefit from the carryover deductions. The benefit was in the form of dividends and appreciation in the value of the stock. Cf. TIR 773." (371 F.2d 809)

As to the actual existence of a conflict between the decisions of the Courts of Appeals herein and in *Maxwell Hardware,* the brief in opposition contains certain statements, or implications, which Vulcan urges are confusing and may create an erroneous impression as to the facts. This brief contains the following two sentences:

> "Here, in 1954, Follansbee acquired property from previously uncontrolled corporations, Consumers and Frontier, and after the acquisitions, Follansbee's stockholders owned 57 percent of the stock

> of the surviving corporation, Union Chemical. This satisfies the 50 percent control requirement under Section 269(a)." (Page 5)

The assertion in the second sentence is, in its context, not relevant to any issue except on the predicate that Union Chemical was a separate corporation from Follansbee. That this is the probable meaning of that sentence is indicated by the later claim that there is no conflict with *Maxwell Hardware,* in these terms:

> "In that case, unlike this one, it was found that the acquiring parties did not obtain the requisite 50% control and, therefore, that Section 269 was inapplicable." (Page 6)

The fact is that Follansbee, the surviving corporation, is identical with Union Chemical, since there was only a change in name in the merger proceedings. This is stated expressly on page 2 of the brief in opposition. In the case at bar, the persons who, for the first time, acquired stock in that surviving corporation, namely stockholders of Consumers and Frontier, did not acquire as much as 50% of either the common stock or of the fair market value of all outstanding stock.

The possible implication of the sentence last quoted that stockholders of Follansbee were "acquiring parties" within the contemplation of Section 269(a) is plainly erroneous. What they did was to *retain* more common stock than was issued to the stockholders of Frontier and Consumers and also to receive preferred stock as a means of compensating them for the value of the net loss carryover.

There is the same occasion for granting the writ on the net operating loss issue as there was in the

case of *Libson Shops* v. *Koehler,* 353 U.S. 382 (1957), since the net loss carryover provisions of the 1954 Code need clarification as much as did those of the 1939 Code.

2. Because of the acquiescence by the Commissioner of Internal Revenue in Kingsford Company v. Commissioner, 41 T.C. 646, and the attitude of the United States in cases like Bryant Heater Company v. Commissioner, 231 F.2d 938, it is improbable that there will be a conflict on the organization and reorganization expense issue in the case of any non-taxable reorganization except a merger, though it involves important recurring questions of law respecting the deductibility thereof which have not been, but should be, decided by this Court.

Notwithstanding the concession made by the United States with respect to the decision in *Bryant Heater Co.* v. *Commissioner,* 231 F.2d 938 (6 Cir., 1956), *Koppers Company, Inc.* v. *United States,* 278 F.2d 946 (Ct. Cl. 1960) and others and the acquiescence of the Commissioner in *Kingsford Company* v. *Commissioner,* 41 TC 646 (1964) reported at 1964-2 C.B. 6, the brief in opposition appears to raise the issue that the deduction should be denied in merger cases because "the surviving corporation in a tax-free reorganization continues the businesses of the predecessor corporations." (p. 5)

This statement is made in the effort to distinguish the decision in *Marr* v. *U. S.,* 268 U.S. 536 (1925) which we urge is in conflict with the decision of the Court of Appeals in the case at bar. We construe that statement to involve an argument which was first raised in the brief in opposition within the contemplation of paragraph 4 of Rule 24. The denial of the petition for the writ came before we filed any reply.

That the non-taxability of the transaction at the corporate, or stockholder, level is not material with

respect to the deductibility of organization and reorganization expenses on the dissolution and liquidation of a corporation was expressly held in *Kingsford Company, Bryant Heater,* and *Koppers Co., Inc.* A like result was reached in other decisions favorable to the taxpayer, but this particular issue was not raised therein. Of those cases, only *Kingsford Company* involves the reorganization provisions of the various statutes.

That question can arise in a "C" type reorganization such as was involved in *Kingsford Company* or in a "B" type reorganization if the corporation whose stock is acquired is thereafter dissolved and liquidated. But in view of the acquiescence of the Commissioner in *Kingsford Company* and of the position of the United States with respect to *Bryant Heater* and like cases, it is improbable that the issue will be presented hereafter in any case which will conflict with the decision of the Court of Appeals in the case at bar. Yet, the status of the deductibility of such expenditures in the case of a merger is an important recurring question which, we submit, should be decided by this Court.

There is one statement in the brief in opposition on this question which appears to be incorrect. We have noted the assertion that there is no conflict of decision. The brief in opposition after making that contention, and stating the rule respecting the deductibility of organization expenses upon the dissolution and liquidation of a corporation, proceeds with the assertion that this rule has "uniformly" been held inapplicable in a merger. This statement is supported by the citation of *Citizens Trust Company* v. *Commissioner,* 20 B.T.A. 392 (1930), and other decisions of that tribunal.

In the use of the word "uniformly," the brief in opposition ignores the decision in *Dragon Cement Company* v. *U. S.*, 144 F.Supp. 188 (D.C., Maine, 1956). On this issue, *Dragon Cement* is in direct conflict with the decision in *Citizens Trust*. The District Judge there specifically stated his disagreement with the Government's contention that there is a "distinction between termination by dissolution and by merger." (144 F.Supp. 191)

The Government did not appeal from that adverse decision, although the taxpayer did appeal. This issue was recognized by the Court of Appeals in *Dragon Cement Company* v. *U. S.*, 244 F.2d 513, 514 (1 Cir. 1957) as one which was no longer in the case.[1]

WHEREFORE, the petitioner respectfully prays that the order denying the petition for a writ of certiorari be vacated and an order granting the petition with respect to each of the issues be granted.

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[1] The statement in the petition that it was the Government which appealed on the other issue is in error.

Certificate

This petition is based on grounds available to petitioner but not previously presented, *i.e.,* that it is improbable that there will be a conflict in other litigation, e.g., *Scribner-Schroth Co.* v. *Cleveland Trust Co.,* 305 U.S. 47, 50. Accordingly, Edward M. Selfe, attorney for the petitioner herein, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in paragraph 2 of Supreme Court Rule 58.

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